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No. 91-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL, ROYSPEC,

Petitioners,

v.

SCOTT NELSON AND VIVIAN NELSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether United States courts have jurisdiction under the "commercial activity" exception in the Foreign Sovereign Immunities Act to review inherently sovereign law enforcement activities of a foreign state carried on in that country.

2. Whether the Foreign Sovereign Immunities Act confers jurisdiction over a suit challenging the conduct of a foreign state where the commercial activity of that foreign state in the United States is unrelated to the non-commercial conduct forming the basis of the suit.

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BRIEF FOR PETITIONERS

Petitioners Saudi Arabia, King Faisal Specialist Hospital, and Royspec [1] request that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit and dismiss the Respondents' actions.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 2937 (1992), and is set forth in the Joint Appendix (J.A.) at 99-115. The opinion of the United States District Court for the Southern District

[1] All parties to this proceeding in the courts below are identified in the caption. In compliance with Rule 29.1 of this Court, Petitioners represent that the Kingdom of Saudi Arabia is a foreign state and that King Faisal Specialist Hospital and Royspec are owned by the Kingdom of Saudi Arabia.

of Florida, reversed by the Eleventh Circuit, is set forth at J.A. 91-98.

GROUNDS FOR JURISDICTION

The Eleventh Circuit issued its decision on February 21, 1991. The petition for rehearing and suggestion for rehearing en banc were denied by the Eleventh Circuit on July 1, 1991. The petition for a writ of certiorari was filed on September 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 (FSIA or the Act), including the sections codified at 28 U.S.C. §§ 1603(d), 1603(e), and 1605 (a)(2) (1988). Pertinent provisions of the FSIA are set forth in the attached statutory appendix.

STATEMENT

Respondents, Scott Nelson and his wife Vivian Nelson,[2] filed this personal injury action in 1988 against the Kingdom of Saudi Arabia; King Faisal Specialist Hospital (KFSH or the Hospital), a hospital owned by Saudi Arabia and located in Riyadh, Saudi Arabia; and Royspec, which is also owned by Saudi Arabia and serves as the Hospital's purchasing agent in the United States. It is undisputed that all three Petitioners are "foreign states" under the FSIA. 28 U.S.C. § 1603(a) & (b) (1988). Accordingly, Petitioners are immune from suit in United States courts unless jurisdiction is authorized by one of the FSIA's limited exceptions to foreign sovereign immunity. The issue in this case is whether jurisdiction exists under the first clause (Clause One) of the FSIA's "commercial activity" exception, which authorizes jurisdiction of actions "based upon a commercial activity carried on in the United States by the foreign state." § 1605(a)(2).

[2] When used in the singular herein, "Respondent" shall refer to Scott Nelson only.

Jurisdictional Facts and Allegations[3]

In September 1983, while in the United States, Respondent allegedly saw a magazine advertisement for a position as a monitoring systems engineer at KFSH in Saudi Arabia. J.A. 52. The advertisement had been placed by Hospital Corporation of America (HCA), a privately-owned corporation under contract with Saudi Arabia to assist in recruitment for the Hospital. J.A. 52. While in Saudi Arabia working for a United States corporation, Respondent interviewed for the monitoring systems engineer position with two officials of the Hospital. J.A. 57. According to his own affidavit, Respondent received an offer for the position *while still in Saudi Arabia* "and then returned to the United States to complete the processing requirements (visas, medical exam, etc.)" for the job. J.A. 57. Respondent subsequently signed a contract of employment with KFSH in Florida in November 1983, J.A. 4, and traveled to Tennessee on December 6, 1983, to attend an orientation session conducted by HCA. J.A. 57. Respondent returned to Saudi Arabia in December 1983 and commenced his employment with KFSH. J.A. 4.

Respondent concedes that he falsely represented to KFSH that he was a graduate of the Massachusetts Institute of Technology (M.I.T.). J.A. 35. He also concedes that he later submitted a forged M.I.T. diploma to KFSH. J.A. 35.[4]

[3] The following facts and allegations relevant to the FSIA jurisdictional issue are taken from the allegations in the complaint and in Respondent's affidavit of November 18, 1986, and from other materials that were before the district court on Petitioners' motions to dismiss for lack of jurisdiction. Because there was no discovery before the district court granted the motions to dismiss, Respondents' allegations of jurisdictional facts were assumed to be true solely for the purpose of the facial challenge to jurisdiction. Petitioners do *not* concede, however, that such allegations in either the complaint or Respondent's affidavit are accurate or complete.

[4] Respondent made these admissions in a related case in which Respondent sued HCA to recover for the same injuries alleged in

Respondent's contract provided that he would be employed as a monitoring systems engineer at KFSH in Riyadh, Saudi Arabia. J.A. 40. It is undisputed that his duties were to be and were performed exclusively in Saudi Arabia. Various contract terms established that the employment relationship would be governed by the laws of Saudi Arabia and the policies of KFSH. For example, Respondent was subject to taxation by Saudi Arabia during his residency in that country; compensation for any "injury or disease sustained by the Employee during or due to work" was to be paid in accordance with "Hospital policy"; and "[i]n the case of any dispute arising from this contract, the Saudi courts, authorities or commissions only will have jurisdiction." J.A. 42, 43, 47.

Respondent worked at the Hospital in Saudi Arabia for a number of months without incident. Respondent alleges that in March 1984, he discovered a defective grease valve in the oxygen and nitrous oxide lines at KFSH, which he reported to Hospital officials and officials of the Saudi government. J.A. 4-5, 52, 57-58. By August 1984, Hospital officials had discovered that Respondent appeared to have falsely represented that he was a graduate of M.I.T.[5] On September 27, 1984, Respondent was arrested by Saudi law enforcement officials. Saudi Arabia has consistently maintained that Respondent was arrested because of his misrepresentations and forgery, R. 64,[6] but Respondent claims that his reports of a safety violation at KFSH led to his arrest. J.A. 4-5.

this case. That case was resolved in favor of HCA because Respondents' claims were barred by the statute of limitations. *Nelson v. Hospital Corp. of Am.*, No. 88-0484 (S.D. Fla. Oct. 31, 1990), *aff'd mem.*, 946 F.2d 1546 (11th Cir. 1991).

[5] An August 28, 1984, KFSH memorandum entitled "A Note to be Presented to HE [His Excellency] the Counsel and Supervisor of Executive Management Relevant to the Educational Qualifications, of Mr. Scott Nelson and the Violation Committed by Him," made part of the record below, indicates that KFSH suspected that Respondent had falsified his academic credentials; that an inquiry to M.I.T. had uncovered that Respondent had not graduated on the date indicated on the diploma he had submitted; that Respondent was informed by the Hospital on or before August 21, 1984, of its concerns about his academic credentials; and that Respondent had refused to provide KFSH with an original or authenticated copy of his M.I.T. certificate. Pl.'s Ex. 4, R. 29.

Respondent alleges that upon his arrest on September 27, 1984, he was taken to the Saudi Arabia "Criminal Investigation Division," locked in a "jail cell," and thereafter "shackled, tortured and beaten" by Saudi officials "acting in their official capacity." J.A. 5, 58. According to his affidavit, this alleged physical abuse occurred for approximately one hour on the day of his arrest. J.A. 58. Respondent further alleges that on October 3, 1984, he was transported to Al-Sijan prison in Saudi Arabia "to await trial on unknown charges." J.A. 54, 59. He alleges that he was detained in a prison cell where he "slept on the floor," with "rats crawl[ing] all over," and was denied adequate food. J.A. 59. There he allegedly was "repeatedly interrogated, in Arabic, by police investigators" and was not advised of the charges against him. J.A. 5. The complaint further alleges that Respondent's family was not advised of his whereabouts for several days, and that his wife subsequently "was informed by an agent of SAUDI ARABIA that [Respondent] could be released in exchange for sexual favors." J.A. 5.

During his imprisonment, Respondent met at least twice with officials of the United States Embassy in Saudi Arabia. In an initial meeting with a United States con-

[6] It is illegal in Saudi Arabia to make false statements in a government employment application or to use forged educational diplomas. Council of Ministers Resolution No. 550 (3/11/1383 Hijra—1963 A.D.) and Royal Decree No. 53 (3/11/1383 Hijra—1963 A.D.) (defining and prohibiting forgery and false statements (Article 5) and providing for fines and up to three years in prison (Articles 6, 8 & 10)). Jurisdiction over these matters was given to the Saudi Board of Grievances by Council of Ministers Resolution No. 223 (4/8/1399 Hijra—July 10, 1979 A.D.). It is also a crime in the United States to make a false statement to the government in a job application. 18 U.S.C. § 1001 (1988); *see United States v. Tamargo*, 637 F.2d 346 (5th Cir.) (conviction under § 1001 for material omission in job application submitted to federal government), *cert. denied*, 454 U.S. 824 (1981).

sular officer on September 30, 1984, Respondent claimed that he had been "roughed up" by the arresting Saudi officials. The United States official determined, however, that "[Respondent's] allegation was not credible" because he had "no bruises or marks" and there was "no indication of undue stress." J.A. 64. In a second visit on October 9, 1984, the United States official again "found no evidence" to support Respondent's claim that he had been beaten by prison guards.[7] J.A. 64. The State Department's report based on these visits states that "[Respondent] was arrested for having presented Saudi officials with a fraudulent college degree from MIT as proof of job qualifications." J.A. 64.

On November 5, 1984, approximately thirty-nine days after his arrest, Respondent was released from prison on the order of the government of Saudi Arabia, acting in response to a request from a United States Senator. J.A. 54, 60. Respondents returned to the United States a few days later. J.A. 60-61.

Respondent testified before the House Foreign Affairs Subcommittee on Europe and the Middle East on June 15, 1987, at which time he submitted a sworn affidavit dated November 18, 1986, and sought to persuade the State Department and Congress to investigate alleged abuses by Saudi law enforcement officials. J.A. 51-66.[8] At this

[7] It is unlawful in Saudi Arabia for civil or military personnel to inflict harm of any kind on a person in custody. Public Securities Regulations of the Kingdom of Saudi Arabia, Royal Decree No. 3594, art. 231, sec. 8 dated 29/3/1369 Hijra (January 1950 A.D.), affirmed by Royal Decree No. M/31, art. 28, dated 21/6/1398 (May 1978 A.D.).

[8] During his congressional testimony, Respondent was asked repeatedly whether there was any possible explanation for his arrest other than his reports of a safety violation at the Hospital. J.A. 62-63. Respondent denied that there had been any allegation of wrongdoing on his part, J.A. 62-63, notwithstanding his awareness that his false statements concerning his academic credentials had been discovered shortly before his arrest, Pl.'s Ex. 4, R. 29, and notwithstanding that the State Department's report of its contemporaneous investigation of Respondent's detention stated that Respondent "was arrested for having presented Saudi officials with a fraudulent college degree from MIT as proof of job qualifications." J.A. 64. Respondent made no mention of his false statements or forgery in his congressional testimony.

hearing, the State Department advised Congress that it did not believe that there was any pattern of imprisonment of Americans in Saudi Arabia without cause. Pl's Ex. 7, R. 46, 129. The State Department noted that more than 40,000 United States citizens reside in Saudi Arabia, Pl's Ex. 7, R. 46, 142, and that it had received complaints of improper detention from only four United States citizens from 1983-87. J.A. 64.

Officials of the State Department and the Ambassador to the United States for the Kingdom of Saudi Arabia, His Royal Highness Prince Bandar bin Sultan, have participated in diplomatic discussions regarding these issues generally and Respondents' specific claims. J.A. 50. The Royal Embassy of Saudi Arabia in Washington has repeatedly assured Respondents that they and their counsel would be provided with visas and guaranteed safe passage to pursue the adjudication of their claims in the courts and administrative tribunals of Saudi Arabia, J.A. 50, and the Saudi Arabia Board of Grievances three times has set hearings to address Respondents' claims. Respondents have declined the offer and did not appear at the scheduled hearings.

Respondents' Complaint

In 1988, nearly four years after leaving Saudi Arabia, Respondents instituted this action against Saudi Arabia and its governmental instrumentalities, KFSH and Royspec. The complaint contains sixteen counts seeking recovery for personal injuries allegedly inflicted by Saudi government law enforcement officials in the course of Respondent's arrest and imprisonment in Saudi Arabia in September and October 1984. Ten counts of the complaint allege intentional torts. Six of these counts are directed against Saudi Arabia, alleging battery, unlawful detainment, wrongful arrest and imprisonment, inhuman torture, disruption of normal family life, and mental an-

guish, respectively, all in alleged violation of United States or international law. J.A. 6-11. Two counts alleging battery and false imprisonment, respectively, are also asserted separately against KFSH and against Royspec. J.A. 15, 19-20.

The complaint also contains three negligence counts, one against each Petitioner, which allege breach of a supposed duty to warn Respondent of "the hidden dangers associated with [his] employment." J.A. 5-6, 14, 18-19. Respondent claims that Petitioners knew or should have known that "officials of the Saudi government, and officials of Saudi institutions such as KFSH, have, and sometimes exercise, the power to have persons summarily arrested, detained, and physically abused, without legal cause," and that "KFSH would be likely to take severe retaliatory action against [Respondent] if he reported and/or attempted to remedy, and/or disclosed to others any health-related or other hazards or problems which he discovered in KFSH." J.A. 6. Respondent alleges that each Petitioner negligently failed to warn him, during his recruitment or employment, of these alleged dangers.

The complaint's three remaining counts assert derivative claims on behalf of Respondent's wife, Vivian Nelson, against each of the three Petitioners. She claims to have suffered loss of consortium, loss of support, and similar injuries as a result of Petitioners' alleged mistreatment of her husband. J.A. 11-12, 16, 20.

The complaint does not include any breach of contract claim. Indeed, Respondent has affirmatively asserted that his claims are *not* "disputes relating to the contract," R. 29, 7, presumably for at least two reasons. First, the employment contract provides that "[i]n the case of any dispute arising from this contract, the Saudi courts, authorities or commissions *only* will have jurisdiction." J.A. 47 (emphasis added). Second, the contract provides that Respondent could be discharged for, *inter alia*, "resorting to forgery to obtain employment." J.A. 44.[9]

[9] Respondent's effort to disassociate his claims from the employment contract is at odds with his assertion, adopted by the Eleventh Circuit, that jurisdiction of these claims exists under the FSIA's "commercial activity" exception. The supposedly relevant "commercial activity" relied upon by the Eleventh Circuit consisted solely of the recruitment, hiring, and employment of Respondent. J.A. 113. Thus, were this Court to find jurisdiction in this case, Respondent would be left to argue anomalously that his claims are "based upon" the employment relationship (the only identified "commercial activity"), but do not "arise from" the employment contract.

Proceedings in the District Court

In September 1988, four years after leaving Saudi Arabia, Respondents filed their complaint in the United States District Court for the Southern District of Florida. Petitioner Royspec moved to dismiss the complaint for lack of subject matter jurisdiction and venue under the FSIA. Petitioners Saudi Arabia and KFSH jointly moved to dismiss for lack of subject matter jurisdiction and venue under the FSIA and also sought dismissal on the ground that the claims were barred by the "act of state" doctrine. Respondents opposed the motions by arguing, *inter alia*, that jurisdiction existed under Clause One of the FSIA's "commercial activity" exception, 28 U.S.C. § 1605(a)(2) (1988).

By memorandum opinion filed August 11, 1989, the district court dismissed the complaint against all three Petitioners for lack of subject matter jurisdiction under the FSIA. J.A. 98. In holding that Saudi Arabia and KFSH were immune from suit, the court declared that the FSIA's "commercial activity" exception was inapplicable for two reasons. First, the FSIA defines "commercial activity carried on in the United States by a foreign state" as commercial activity having "substantial contact with the United States." 28 U.S.C. § 1603(e) (1988). The district court found that the commercial activity of the Hospital and Saudi Arabia did not have "substantial contact with the United States," even if HCA's recruiting activities with respect to Respondent were imputed to them. Emphasizing that "[Respondent] was interviewed by KFSH in Saudi Arabia" and that "the employment contract was to be performed in Saudi Arabia," the district court con-

cluded that "substantial contact with the United States" under the FSIA requires more significant activity than the "fortuitous happenstance" that Respondent signed the employment contract in Florida. J.A. 95.

Second, the district court concluded that even if these recruitment activities were viewed as having "substantial contact" with the United States, Respondents' claims were not "based upon" that commercial activity under Section 1605(a)(2). J.A. 96. The court observed that Respondents had not alleged "some type of commercial cause of action arising from the employment contract"; rather, the "gravamen of [Respondent's] complaint . . . is an action for personal injuries." J.A. 97. Respondents' only argument for jurisdiction was that "but for [Respondent's] recruitment in the United States, [Respondent] would not have taken the job, been arrested, and suffered the personal injuries"—a connection the district court found "far too tenuous to support jurisdiction over a foreign sovereign." J.A. 97. The court similarly held that Respondents' negligent failure to warn claims were not based upon Petitioners' commercial acts in the United States, noting that Respondents had not alleged that Respondent was recruited "for the purpose of imprisoning and torturing U.S. citizens." J.A. 97.

With respect to Royspec, the district court determined that although Royspec's commercial activity (purchasing equipment and medical supplies for KFSH) had "substantial contact with the United States," "[t]he only connection between Royspec and [Respondent] is that [Respondent] was given Royspec's phone number in Maryland as a way for his family to contact him in the event of an emergency." J.A. 96. The court thus dismissed the action against Royspec for lack of jurisdiction under the FSIA because there was "absolutely no nexus between Royspec's business and the torts alleged in [Respondents'] complaint." J.A. 96.

Proceedings in the Court of Appeals

The Court of Appeals for the Eleventh Circuit reversed, holding that the FSIA's "commercial activity" exception

created jurisdiction over all three Petitioners for all of Respondents' claims. J.A. 115. The court of appeals held that "when there is a 'jurisdictional nexus' between the acts for which damages are sought, and the foreign sovereign's commercial activity," the claim is "based upon" commercial activity. J.A. 109. The court thus interpreted the FSIA's "commercial activity" exception to permit a United States court to adjudicate claims alleging injury from the *non-commercial, governmental* acts of a foreign state, as long as there is some connection ("nexus") between those acts and other commercial activity.

With respect to Saudi Arabia and KFSH, the court of appeals held that such a nexus existed because the arrest and imprisonment of Respondent "resulted from and [was] directly attributable to [Respondent's] employment." J.A. 113. The court reasoned that whether Respondent was arrested and detained for performing his job duties at KFSH or for his false statements and forgery, the arrest and detention were related to his employment. J.A. 113-14. Asserting that the recruitment and hiring of Respondent "was part of a process having 'substantial contact with the United States,'" J.A. 109, the court held that "the detention and torture of [Respondent] are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States." J.A. 113.[10] The court of appeals also found a sufficient "jurisdictional nexus" between Royspec's commercial activity in the United States and Respondents' claims. J.A. 114.

Petitioners requested rehearing or rehearing en banc, and the United States filed a statement in support of rehearing. After the rehearing requests were denied, Petitioners timely filed a petition for a writ of certiorari, and the United States filed a statement in support of review. The petition was granted on June 8, 1992.

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[10] The court of appeals did not reach Petitioners' argument for dismissal under the "act of state" doctrine. J.A. 114.

SUMMARY OF ARGUMENT

Petitioner Saudi Arabia is a foreign state. Petitioners KFSH and Royspec are instrumentalities of Saudi Arabia and therefore are also "foreign states" under the FSIA. 28 U.S.C. § 1603(a) & (b) (1988). Accordingly, the FSIA is the exclusive source of jurisdiction over Petitioners in the United States courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA establishes a presumption that foreign states are immune from suit unless one of the limited statutory exceptions applies. 28 U.S.C. § 1604 (1988).

The Eleventh Circuit found that Clause One of the FSIA's "commercial activity" exception, which permits jurisdiction where the action is "based upon a commercial activity carried on in the United States by the foreign state," § 1605(a)(2), confers jurisdiction over this case. Notwithstanding that Respondent's injuries are alleged to have occurred entirely in Saudi Arabia as a result of arrest, imprisonment and alleged mistreatment by Saudi government law enforcement officials, the Eleventh Circuit applied the "commercial activity" exception because these acts allegedly had a "nexus" with Respondent's employment in Saudi Arabia and his alleged recruitment and hiring in the United States. This assertion of jurisdiction over claims involving a foreign state's police actions committed wholly within its sovereign territory is unprecedented, and should be overturned for at least two reasons.

First, Respondents' claims are not "based upon commercial activity" within the meaning of the FSIA. Police brutality, wrongful arrest and imprisonment, and similar alleged abuses of a foreign state's police power cannot possibly be characterized as "commercial activity," but rather involve governmental acts of precisely the kind that Congress expressly intended to immunize from suit in United States courts. Although recognizing that such acts are not commercial, the Eleventh Circuit adopted a contorted and unduly expansive construction of the statutory phrase "based upon" to find jurisdiction over such

inherently governmental acts because of their supposed "nexus" with Respondent's employment. This holding deviates from the plain and ordinary meaning of the statutory term "based upon," which requires not just a "nexus" with commercial activity, but that the foundation or basis of the suit—*i.e.*, the acts complained of by the plaintiff—be commercial. Moreover, by authorizing jurisdiction over non-commercial sovereign acts because of their supposed commercial motivation, the Eleventh Circuit violated Section 1603(d)'s express mandate that "[t]he commercial character of an activity shall be determined by reference to the nature of [the act], rather than by reference to its purpose." *See Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992). The Eleventh Circuit's interpretation erroneously confuses the two distinct inquiries required under Clause One: (1) whether the acts complained of (*i.e.*, the basis of the complaint) are commercial in nature; and (2) whether such commercial acts have substantial contact with the United States. If the first inquiry reveals that the *nature* of the acts in dispute is governmental rather than commercial, jurisdiction cannot exist under Section 1605(a)(2) regardless of those acts' connection to other commercial activity.

The court of appeals' interpretation also contravenes the FSIA's core purpose of codifying the "restrictive" principle of foreign sovereign immunity, under which foreign states are immune from suits involving their public acts but not from suits involving their commercial or private acts. The legislative history demonstrates that Congress intended to confer jurisdiction when a foreign state acts as a "merchant" and a dispute involves that state's "commercial obligations," but to retain foreign sovereign immunity from suits challenging a foreign state's public acts taken within its own territory. The retention of the core principle of restrictive foreign sovereign immunity was grounded in Congress's desire to avoid interfering with the internal affairs of foreign governments, which could have adverse consequences for United States foreign relations and the reciprocal treatment of the United

States in foreign courts. Such concerns are starkly implicated here because this case would require a United States court to conduct an intrusive inquiry in an effort to adjudge the lawfulness of Saudi Arabia's procedures for arrest and interrogation, its prison conditions, and other essential characteristics of its sovereign law enforcement system.

Second, even if the complaint could be said to be based upon commercial activity insofar as the claims allegedly relate to Respondent's employment in Saudi Arabia, such commercial activity did not have the necessary "substantial contact with the United States." 28 U.S.C. § 1603(e) (1988). Every act of potential significance to Respondent's claims—*e.g.*, Respondent's performance of the employment contract, his reporting of alleged safety violations at KFSH, his arrest and imprisonment, and his alleged injuries from mistreatment in prison—occurred solely in Saudia Arabia. None of the claims depends on proof of *any* of the few minor events alleged to have occurred in the United States, such as his reading of the job advertisement or his signing of the employment contract. Because these incidental acts in the United States are factually and legally irrelevant to Respondents' claims, the activity in Saudi Arabia on which the claims are based lacks the "substantial contact" with the United States necessary to create jurisdiction over Petitioners under Clause One of Section 1605(a)(2). In addition, jurisdiction over Respondents' claims against Royspec must fail for the further reason that the record is undisputed that Royspec had absolutely no involvement with any activity on which Respondents' claims are even arguably based. The decision of the court of appeals in this case should be reversed and Respondents' actions should be dismissed.

ARGUMENT

I. RESPONDENTS' CLAIMS ARE NOT "BASED UPON COMMERCIAL ACTIVITY" UNDER CLAUSE ONE OF 28 U.S.C. § 1605(a)(2)

Since 1952, the governing principle of foreign sovereign immunity in the United States courts has been that foreign states are subject to suit only for their private or commercial acts (*actiones jure gestionis*), not for their public or sovereign acts (*actiones jure imperii*). This "restrictive" principle of foreign sovereign immunity was followed as a matter of State Department policy for almost twenty-five years, and was codified in the FSIA in 1976. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). The FSIA's "commercial activity" exception was designed specifically to embody this principle of preserving immunity for internal governmental actions of a foreign state, while limiting immunity for foreign state acts of a commercial nature. *See Weltover*, 112 S. Ct. at 2165 ("[T]he Act (and the commercial exception in particular) largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952."); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14 (1976) [hereinafter House Report] (FSIA intended to preserve immunity in "cases involving acts of a foreign state which are sovereign or governmental in nature").

The court of appeals' decision undermines this core congressional purpose by requiring Saudi Arabia to appear in a United States court to defend the manner in which it enforces its laws and exercises its police power within its own borders. The acts that form the basis of Respondents' claims—that Saudi law enforcement officials, "acting in their official capacity," "summarily arrested, detained, and physically abused" him in Saudi Arabia "without legal cause," J.A. 6—cannot be characterized as "commercial activity" under either a common sense interpretation or the statutory definition of the term. The FSIA provides that "[t]he commercial character of an activity shall be determined by reference to

the *nature* of the course of conduct or particular transaction or act, rather than by reference to its *purpose*," 28 U.S.C. § 1603(d) (1988) (emphasis added); a foreign state thus acts commercially under the FSIA only when it acts "in the manner of a private player" within a market by performing "the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover*, 112 S. Ct. at 2166 (emphasis in original) (citation omitted). Regardless of whether they relate to a commercial *purpose*, a foreign state's actions such as arrest, interrogation, imprisonment, and physical punishment are plainly actions of a governmental rather than a commercial *nature*.[11] Accordingly, this suit should be dismissed because the acts that allegedly injured Respondents—*i.e.*, the acts their claims are "based upon"—are non-commercial, public acts that cannot support jurisdiction under Clause One.[12]

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[11] As explained more particularly at pp. 36-38 *infra*, because Respondents' duty to warn claims would entail proof of the same injuries from the same inherently non-commercial acts at issue in the remainder of the complaint, these negligence claims also cannot be adjudicated under the "commercial activity" exception.

[12] The lower courts have uniformly characterized the exercise of the police power by a foreign state as sovereign rather than commercial conduct under the FSIA. *See, e.g., Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980) (stating in dicta that claims of battery and false imprisonment against state-owned airline which detained and involuntarily rerouted plaintiffs are based upon sovereign conduct); *Herbage v. Meese*, 747 F. Supp. 60, 67 (D.D.C. 1990) ("From the constable carrying out the arrest, to the detective, to the prosecutor, these defendants were performing official government functions, classically belonging to the discretion of the executive, and classically immune from suit") (footnoted omitted), *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991); *Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578, 584 (E.D. Pa. 1985) ("[D]ecisions whether and how to . . . police the activities of [a foreign state's] citizens . . . are peculiarly governmental"), *aff'd*, 800 F.2d 1140 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986); *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1064 (E.D.N.Y. 1979) ("governmental, public or sovereign enterprises" include "running police departments"). *See also* H. Lauterpacht, *The Problem of Jurdisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l Law 220, 237 (1951) ("there must be immunity from jurisdiction in respect of the executive and administrative acts of the foreign state within its territory, such as . . . wrongful imprisonment or, generally, denial of justice").

The court of appeals sought to sidestep this ineluctable conclusion by expansively interpreting "based upon" essentially to mean "in connection with" or "relating to." In the court's view, jurisdiction exists under Clause One of the "commercial activity" exception to adjudicate claims alleging injury from incontrovertibly *non-commercial* and *governmental* acts of a foreign state so long as those "acts for which damages are sought" have a so-called "jurisdictional nexus" with other commercial activity of the foreign state. J.A. 109. The court recognized that the "acts for which damages are sought" by Respondents in this case (*e.g.*, arrest, imprisonment, and torture) are *not* commercial acts, but asserted that Respondent's claims involving such acts "are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital." J.A. 113. For the reasons set forth below, this conclusion contravenes the plain language and structure of the FSIA, the legislative history, and the underlying statutory purposes, all of which demonstrate that jurisdiction under Clause One is limited to claims where the injurious acts in dispute are themselves commercial in nature.[13]

A. The Eleventh Circuit's Holding Contravenes The Plain Meaning And Structure Of The FSIA's "Commercial Activity" Exception

The construction of a federal statute must begin, of course, with the plain meaning of the statutory language. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981). Further, any construction of the FSIA should be informed by this Court's "deeply felt and traditional reluctance . . . to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes,"

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[13] Clause One of § 1605(a)(2) is the sole jurisdictional basis on which Respondents have relied in this case. J.A. 93, 107.

Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1958), as well as by the principle that waivers of immunity should be strictly construed, *see Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986) (court "must construe waivers [of immunity] strictly in favor of the sovereign . . . and not enlarge the waiver 'beyond what the language requires.'") (citation omitted).

Petitioners' interpretation of Clause One of the "commercial activity" exception adheres to these principles by giving effect in a straightforward manner to the actual language chosen by Congress: jurisdiction is limited to suits "based upon commercial activity," *i.e.*, suits where *commercial acts* of the foreign sovereign are the *basis* of the plaintiff's claims. "Based upon" is not defined in the FSIA, but its meaning is simple and clear. The word "based" means "having as a base." Webster's Third New International Dictionary 181 (4th ed. 1976). "Base" means "the bottom of something considered as its support; that on which something rests or stands; foundation," and "basis" means "the bottom of anything considered as a foundation for the parts above" and "the principal component of anything; fundamental ingredient." *Id.* at 180, 182. In this plain and ordinary sense, the "base" or "basis" or "foundation" or "fundamental ingredient" of a civil action can only be the act or acts that allegedly caused the injury for which the plaintiff seeks to recover damages. Thus, the natural reading of Clause One is that jurisdiction exists only where the damage-causing acts complained of are themselves commercial acts. Respondents' claims therefore cannot fall within the "commercial activity" exception because the acts that allegedly injured him—wrongful arrest, imprisonment, and mistreatment in prison by Saudi law enforcement officials acting in their official capacity—are inherently non-commercial, governmental acts.

The court of appeals rejected this common sense understanding of "based upon." It concluded that for jurisdiction to exist under Clause One of Section 1605(a)(2), the "acts for which damages are sought" (*i.e.*, the injurious acts actually at issue in the suit) need not themselves be commercial, but rather need only have a "nexus" with other commercial activity of the foreign state. J.A. 109-11. This expansive and unnatural interpretation of "based upon" is untenable for several reasons.

First, such a concept of "nexus"—which connotes merely a "connection" or "tie" or "link," Webster's Third New International Dictionary 1524 (4th ed. 1976)—is incompatible with the plain and ordinary meaning of "based upon" as discussed above. The terms "nexus with" and "based upon" are not comparable; saying that X has a connection or link with Y is entirely different from saying that X is based upon Y. Indeed, in Clauses Two and Three of the "commercial activity" exception, Congress expressly provided for jurisdiction over actions "based upon . . . an act performed in the United States *in connection with* a commercial activity of the foreign state elsewhere" or "based upon . . . an act outside the territory of the United States *in connection with* a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (1988) (emphasis added). This demonstrates not only that Congress understood the meaning of "based upon" to differ from "in connection with," but also that Clause One could easily have been crafted to provide explicitly that immunity does not exist for actions "in connection with a commercial activity carried on in the United States," had Congress so intended.[14] The natural

[14] The Eleventh Circuit's strained construction of "based upon" to mean "in connection with" or "having a nexus with" also creates serious interpretive problems in Clause Two of § 1605(a)(2), which as noted above is also modified by the "based upon" language. Under that construction, Clause Two would permit jurisdiction whenever an action "has a nexus with an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." By creating the possibility that jurisdiction could exist even where both the act complained of and the commercial activity occurred outside the United States, such a construction would impermissibly negate Clause Two's clear purpose of limiting jurisdiction to cases where the damage-causing commercial act was itself

inference is that "based upon commercial activity" was intended to mean more than a mere "nexus" or "connection" with commercial activity. *See Melkonyan v. Sullivan*, 111 S. Ct. 2157, 2161 (1991) (when Congress chooses language different from that selected in another part of the same statute, Congress presumably intended a different meaning).

Second, to construe the "based upon" language to permit jurisdiction over non-commercial, public acts of a foreign state, as long as they have a "nexus" with commercial activity, would contravene the FSIA's explicit mandate that the distinction between commercial and governmental acts must turn on the *nature* of the foreign state's conduct, not its *purpose*. In defining "commercial activity," the statute provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (1988). If a foreign state performs acts of an inherently commercial nature, those acts are "commercial activity" regardless of whether they were carried out for an entirely sovereign or public purpose. *Weltover*, 112 S. Ct. at 2166. Similarly, if a foreign state performs acts of an inherently governmental nature, those acts do *not* constitute "commercial activity" regardless of whether they were carried out solely for a commercial purpose.

In contravention of this statutory mandate, the court of appeals authorized jurisdiction over the inherently non-commercial and governmental acts of Saudi Arabia that are alleged to have injured Respondents, precisely on the theory that those acts were carried out for a commercial purpose. The court reasoned that whether Respondent's

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performed in the United States. *See* House Report at 19, discussed in text at p. 25 *infra*. *See, e.g., Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 388 (5th Cir. 1991) (Clause Two did not support jurisdiction over breach-of-contract action because the acts allegedly performed in the United States "clearly [did] not form the basis for [the] complaint[].").

detention and alleged mistreatment occurred because he reported a safety violation at the Hospital (as he contends) or because of his false statements and forgery (as Petitioners contend), those acts were related to his employment and therefore were undertaken for commercial reasons. J.A. 113-14. This reasoning eviscerates the statute's plain specification that any commercial motivation for the actions allegedly taken by Petitioners against Respondent must be disregarded as irrelevant, "[h]owever difficult it may be in some cases to separate 'purpose' (*i.e.*, the *reason* why the foreign state engages in the activity) from 'nature' (*i.e.*, the outward form of the conduct that the foreign state performs . . .)." *Weltover*, 112 S. Ct. at 2167 (emphasis in original). By looking to the supposed "nexus" between the foreign state's public acts and its commercial motivation for those acts, the Eleventh Circuit's test makes the foreign state's supposed commercial purpose—the "why"—re-emerge as the decisive jurisdictional factor. The Act's definition of "commercial activity" thus becomes substantially irrelevant: even if a foreign state's inherently governmental acts are not "commercial activity," jurisdiction over those sovereign acts is asserted anyway because of their "nexus" with the state's commercial purposes.[15] Such a judicial modification of the key element of the statutory framework cannot be accepted.

At bottom, the Eleventh Circuit's "jurisdictional nexus" analysis confuses the two distinct inquiries mandated by Clause One of Section 1605(a)(2): (1) whether the action is "based upon commercial activity," *i.e.*, whether the specific foreign state conduct at issue is com-

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[15] This approach also is an overtly jurisdiction-maximizing approach. Where a foreign state acts in a commercial manner, the underlying purpose is ignored and jurisdiction is established (as Congress provided). But where a foreign state acts in a governmental manner, the underlying purpose *is* looked to in an effort to create jurisdiction by connecting the acts to a commercial motivation. The language of the "commercial activity" exception cannot support such a reading biased in favor of jurisdiction over foreign sovereigns.

mercial in nature, and (2) whether such commercial activity has "substantial contact with the United States" as provided in Section 1603(e). Although this latter inquiry has been described as involving a "nexus" analysis, it arises only where the acts complained of are *clearly commercial in nature*, and the issue is whether those commercial acts (which may have occurred wholly or primarily outside of the United States) have a sufficient *geographical* nexus (*i.e.*, have "substantial contact") with the United States. *See, e.g., Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 387 (5th Cir. 1991) (finding no jurisdiction because the specific commercial acts forming the basis of the suit—breach of contract and negligent misinterpretation—occurred solely in Mexico and Sweden and had no nexus with the commercial activity in the United States); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 819-20 (3d Cir. 1981) (finding jurisdiction of claim because commercial acts at issue—sailing of ship into United States ports and loading and unloading of cargo there—had a sufficient nexus with the United States), *cert. dismissed*, 455 U.S. 929 (1982). However, none of the many lower court decisions involving the "commercial activity" exception has applied a "jurisdictional nexus" test in the fundamentally different sense employed by the Eleventh Circuit to recognize jurisdiction over non-commercial, public acts on a theory that they relate to other commercial activity. Rather, courts have routinely determined that if the specific conduct on which the claims are based—*i.e.*, the "gravamen" of the complaint—does not constitute "commercial activity," the jurisdictional inquiry under Section 1605(a)(2) is at an end. *See Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981) (If the "particular behavior" "is not 'commercial,' it satisfies none of the three clauses of § 1605(a)(2), and the foreign state is . . . immune from suit."), *cert. denied*, 454 U.S. 1148 (1982).

This statutorily-mandated approach was well stated by the Fifth Circuit in *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985):

> In ascertaining whether the commercial activity exception applies, three questions are involved. First, we must define with precision the relevant activity . . . In particular, we must isolate those specific acts of the named defendant that form the basis of the plaintiff's suit . . . . Second, we must determine whether the relevant activity is sovereign or commercial—a label which depends on the nature of the activity rather than on its purpose . . . . Finally, if the activity is commercial in nature, we must determine whether it had the requisite jurisdictional nexus with the United States.

Id. at 1391 (citations omitted) (footnote omitted). Applying this test, the court determined that the foreign state bank's issuance of a check and subsequent refusal to honor the check were sovereign in nature because the bank had issued the check as part of "its official role of regulating the sale of foreign exchange," and held that the bank was immune from suit notwithstanding that the bank had issued the check in connection with other commercial activity. *Id.* at 1393-95.

Numerous other courts have similarly concluded that if the foreign state act at issue is governmental in nature, jurisdiction cannot exist under Section 1605(a)(2) regardless of whether the act has any nexus to commercial activity. *See, e.g., Gregorian v. Izvestia*, 871 F.2d 1515, 1521 (9th Cir.) ("commercial activity" exception did not confer jurisdiction over a claim alleging that *Izvestia*, an official publication of the Soviet Union, had libelled the plaintiff to avoid contractual obligations, because "plaintiffs' characterization of the alleged libel as 'commercial' rests on 'reference to its purpose,'" whereas "[t]he *nature* of the *Izvestia* article . . . is clearly governmental") (emphasis in original), *cert. denied*, 493 U.S. 891 (1989); *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988) ("commercial activity" exception did not confer jurisdiction over claims of misrepresentation in connection with plaintiff's commercial investment in foreign state because the act complained of—a change in Taiwan's customs law—was governmental

in nature); *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1328, 1329 (9th Cir.) (stating that the "crucial step" in the analysis "is defining the 'act complained of here'" and deciding "whether that act is commercial or sovereign," and finding no jurisdiction over a United States corporation's claim based on Bangladesh's termination of a licensing agreement for the export of rhesus monkeys, notwithstanding the termination's commercial effects, because Bangladesh's "right to regulate its natural resources" was "a uniquely sovereign function"), *cert. denied*, 469 U.S. 1037 (1984).

This analysis has also been applied specifically to conclude that a foreign state's exercise of the police power within its own borders cannot be adjudicated under the "commercial activity" exception.[16] *See, e.g., Arango v. Guzman Travel Advisers Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980) (stating in dicta that the "commercial activity" exception cannot confer jurisdiction over claims of false imprisonment and battery against a foreign state-owned airline that detained and involuntarily rerouted plaintiffs); *Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578 (E.D. Pa. 1985) ("commercial activity" exception does not confer jurisdiction over claims against Bahamian government for failure to regulate horseback riding and investigate related accidents because "[s]uch decisions are peculiarly governmental and may not be subject to scrutiny in the United States courts"), *aff'd*, 800 F.2d 1140 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986); *Magnus Elecs., Inc. v. Royal Bank of Canada*, 620 F. Supp. 387, 390 (N.D. Ill. 1985) (Section 1605(a)(2) does not confer jurisdiction over claims of fraud and conversion based upon seizure of goods by government

[16] *See also Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) (refusing to permit execution under 28 U.S.C. § 1610(a)(2), an FSIA exception to immunity paralleling the "commercial activity" exception, because the alleged state-sponsored terrorism at issue (assassination and assault and battery) was not conducted "as a merchant in the marketplace" but rather was "governmental" conduct that is immune from suit regardless of its connection to commercial activity), *cert. denied*, 471 U.S. 1125 (1985).

agents because "[w]hatever else Argentina's alleged conduct may be termed, it is not 'commercial activity'"); *Perez v. The Bahamas*, 482 F. Supp. 1208, 1210 (D.D.C. 1980) ("commercial activity exception does not apply" to claims of attempted murder and piracy based upon "[p]olice enforcement of Bahamian fishing law"), *aff'd*, 652 F.2d 186 (D.C. Cir.), *cert. denied*, 454 U.S. 865 (1981).

For all of these reasons, the language of Section 1605(a)(2) and the structure of the FSIA as a whole cannot support the Eleventh Circuit's broad jurisdictional construction. The "commercial activity" exception to sovereign immunity applies only when the allegedly injurious acts of the foreign state are commercial in nature. If such acts instead are governmental in nature, Section 1605(a)(2) does not create jurisdiction regardless of whether they were taken in connection with the foreign state's commercial interests. In this case, because the nature of the alleged wrongful acts of Petitioners unquestionably is governmental rather than commercial, these acts are *per se* immune from suit under the "commercial activity" exception.

B. The Legislative History Of The FSIA Confirms Petitioners' Reading Of The Plain Language Of The "Commercial Activity" Exception

Because the ordinary meaning of the FSIA's "based upon commercial activity" language cannot support the assertion of jurisdiction over Petitioners in this case, the judicial inquiry need go no further. This Court has long held that "[t]he strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances when a contrary legislative intent is clearly expressed." *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) (citations and internal quotations omitted). Here the legislative history not only fails to undercut the straightforward meaning of the statutory language, but in fact confirms that Congress did not intend the "commercial activity" exception to per-

mit United States courts to adjudicate claims involving the public acts of a foreign sovereign in its own territory.

Congress's primary purpose in enacting the FSIA was to codify the "restrictive" principle of sovereign immunity, under which a foreign state retains immunity in "cases involving acts . . . which are sovereign or governmental in nature," but is subject to suit in cases involving acts "which are either commercial in nature or . . . which private persons normally perform." House Report at 14. The centrality of this public versus private acts distinction was reiterated repeatedly throughout the legislative history materials.[17] *See, e.g., id.* at 7, 8; *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 25, 26 (1976) [hereinafter House Hearings] (statement of Monroe Leigh, U.S. Dep't of State Legal Adviser); *id.* at 30 (statement of Bruno Ristau, Chief, Foreign Litigation Section, Civil Division, U.S. Dep't of Justice).

The "commercial activity" exception was the key statutory vehicle for implementing this fundamental distinction. As explained by the executive branch officials responsible for preparing and presenting the draft legislation the underlying premise was as follows:

> [W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause. The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.

Id. at 27 (statement of Monroe Leigh). Subjecting a foreign state to suit involving its commercial obligations was deemed consistent with the retention of foreign sovereign immunity for governmental acts:

[17] The Senate Report is identical to the House Report.

> [I]t is manifest now that the adjudication of a commercial claim against a foreign state on the merits does not affront the sovereignty of a foreign nation because sovereignty, as such, is not implicated in such an adjudication. The foreign state makes its appearance in the marketplace as a merchant, not as a sovereign, and it is as a merchant that the foreign state is adjudged liable on its commercial obligations.

Id. at 30 (statement of Bruno Ristau).

Congress also emphasized that "it is the essentially commercial nature of an activity or transaction that is critical" in determining when the "commercial activity" exception abrogates sovereign immunity. House Report at 16. The legislative history explains that claims based on commercial acts may be heard in United States courts even if the acts were undertaken for a governmental purpose, such as when a foreign state enters into contracts to purchase equipment for its armed forces or to construct a government building. *Id.* Equally clear from the legislative history, however, was that any claim involving *public* acts would *not* be justiciable in the United States under the "commercial activity" exception. By emphasizing that foreign states could be sued when acting "as a merchant," Congress sought to ensure that immunity would continue to be recognized when foreign states acted as sovereigns.

The State Department Legal Adviser testified, for example, that the purpose of restrictive sovereign immunity "is to promote the functioning of all governments by protecting a state from the burden of defending law suits abroad which are based on its public acts." House Hearings at 27 (statement of Monroe Leigh). *See also* House Report at 17 (foreign state's burden of proving immunity encompasses proof "that the plaintiff's claim relates to a public act of the foreign state"). None of the legislative history's many examples of suits permissible under the "commercial activity" exception indicates that any public acts, much less such inherently governmental conduct as arrest and imprisonment, may be adjudicated in the United States if carried out for commercial reasons. The

legislative history emphasizes repeatedly that whether an act has a commercial nature or a governmental nature will be decisive in determining the applicability of the "commercial activity" exception. For example, the State Department Legal Adviser stated:

> The substantive provision on commercial activities appears in section 1605(a)(2). However, the definition of a "commercial activity" is of central importance and it appears in section 1603, the definition section. Under the definition, one determines whether an act is commercial by looking at its "nature" and not at its "purpose."

House Hearings at 27 (statement of Monroe Leigh). Similarly, when asked how the bill would distinguish between commercial and public activity, the Legal Adviser replied that the question "goes to the heart of this," noted that "the courts would inquire whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments," and concluded that any difficulties in applying the distinction would need to be resolved by the courts on a case-by-case basis. *Id.* at 53.

Indeed, the House Report makes clear that all three clauses of Section 1605(a)(2) are limited to actions where the conduct complained of is *commercial in nature*. For example, Clause Two provides jurisdiction over any action "based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2) (1988). The House Report describes Clause Two as providing "expressly for the case where a claim arises out of a specific act in the United States *which is commercial or private in nature* and which relates to a commercial activity abroad. It should be noted that *the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.*" House Report at 18 (emphasis added). This statement confirms both that "based upon" does not embody a mere "nexus" principle and that jurisdiction exists under Section 1605(a)(2) only where the specific acts complained of are commercial in nature.[18]

In sum, the legislative history confirms that the FSIA was intended to preserve the distinction between *actiones jure gestionis* and *actiones jure imperii* that was at the heart of the restrictive theory of sovereign immunity followed by the State Department since 1952.[19] *See Weltover*,

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[18] Congress provided a separate and limited exception for non-commercial torts committed entirely in the United States, 28 U.S.C. § 1605(a)(5) (1988), which was intended principally to address the problem of traffic accidents committed in the United States by foreign states or their employees. House Report at 20. Because this exception excludes claims "arising out of malicious prosecution" or "abuse of process," even if such torts occur entirely in the United States, § 1605(a)(5)(B), it is especially difficult to believe that Congress intended Respondents' causes of action, which are clearly predicated upon an alleged abuse of legal process occurring abroad, *see Mundt v. United States*, 611 F.2d 1257, 1259 (9th Cir. 1980), to be adjudicated in United States courts under the "commercial activity" exception. *See Gregorian*, 871 F.2d at 1522 n.4 (foreign states are completely immune from claims involving malicious prosecution or abuse of process regardless of any connection between the conduct forming the basis of those claims and the foreign state's commercial activity).

[19] Because Congress drafted the "commercial activity" exception with reference to the body of existing law dealing with this fundamental distinction between public and private activities of a sovereign state, "[t]he meaning of 'commercial' [in the FSIA] is the meaning generally attached to that term under the restrictive theory at the time the statute was enacted." *Weltover*, 112 S. Ct. at 2165. Prior to 1976, foreign states were not subjected to suit in the United States for claims involving the exercise of the police power within their own borders, regardless of any connection of that conduct to commercial activity. *See, e.g.*, Benton v. Cuban Air Force, Appendix, Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977 (M. Sandler, D. Vagts and B. Ristau eds.) *in Digest of United States Practice in International Law*, 1045-46 [hereinafter *Decisions*] (recognizing Cuba's immunity from suit alleging that plaintiff was detained and interrogated at the Havana airport by an armed guard of the Cuban Air Force and had a considerable sum of U.S. currency confiscated from him); *Kendall v. Kingdom of Saudi Arabia*, *Decisions*, at 1053-54 (determining that Saudi Arabia should be immune from

112 S. Ct. at 2165. Both the specific words and the overarching tenor of the House Report and the statements of the legislation's drafters leave no doubt that jurisdiction under Section 1605(a)(2) was intended to be exercised only where the foreign state appears "in the marketplace as a merchant" and the claimant seeks to hold the foreign state "liable on its commercial obligations." House Hearings at 30 (statement of Bruno Ristau). The version of the "commercial activity" exception proffered by Respondents and accepted by the Eleventh Circuit is vastly broader in scope, for it would permit the United States courts to adjudge a foreign sovereign liable for its acts not as merchant but as policeman, investigator, and jailor. Had Congress even remotely contemplated such a prospect, the legislative history surely would have reflected consideration of the implications of such a potentially sensitive intrusion into a foreign state's internal affairs.[20] Because

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suit in which plaintiffs alleged personal injury and property damage after their plane had been fired on by Saudi militiamen in the Gulf of Aqaba). More generally, in applying the restrictive principle, both the State Department and the courts consistently recognized that a foreign state retained immunity for its public acts. *See, e.g., Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964) (stating that "strictly political or public acts" which are immune from suit include "internal administrative acts, such as the expulsion of an alien"), *cert. denied*, 381 U.S. 934 (1965).

[20] In *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir.), *cert. denied*, 469 U.S. 881 (1984), in which a former hostage sued Iran for injuries inflicted in its seizure and detention of American hostages, the plaintiff sought jurisdiction under § 1605(a)(5) on a theory that the alleged torts occurred entirely in the United States because they took place within the United States Embassy in Iran. In dismissing the suit, the D.C. Circuit observed that the plaintiff's argument was profoundly inconsistent with the FSIA's legislative history and purposes:

> Another reason for finding that sovereign immunity exists here is the series of unhappy consequences that would follow if we read [the Act] broadly to cover areas in which the United States had jurisdiction of any sort. These consequences would entail not only serious inconvenience and injustice but also embarrassment to our foreign relations. We offer these considerations not as policies we choose but as throwing light on congressional intent. *If Congress had meant to remove sovereign immunity for governments acting on their own territory, with all of the potential for international discord and for foreign government retaliation that involves, it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in this country.* *Id.* at 841 (emphasis added).

the exercise of such jurisdiction is contrary to the entire weight of the legislative history, as well as to the statutory language, it must be rejected.

C. The Court Of Appeals' Statutory Construction Conflicts With The FSIA's Underlying Purpose Of Immunizing Foreign States From Suits Concerning The Propriety Of Their Public Acts

A final flaw in the court of appeals' "jurisdictional nexus" standard is that it contravenes the central purpose of the restrictive principle of foreign sovereign immunity by opening the door to a severe judicial intrusion into the internal affairs of foreign states, with potentially damaging repercussions to United States foreign relations and the treatment of the United States in foreign courts. Avoiding such adverse consequences has long been a central underpinning of both the absolute and restrictive principles of foreign sovereign immunity. Accordingly, this Court should be especially reluctant to construe the "commercial activity" exception in an expansive manner that would subject the internal public acts of a foreign sovereign to the scrutiny of United States courts. *See Kosak v. United States*, 465 U.S. 848 (1984) (refusing to adopt interpretation of FTCA that limited the government's immunity where Congress clearly intended that the governmental activities at issue not be disrupted by the threat of damage suits).

It has long been recognized that governments are extraordinarily sensitive to any inquiry by a foreign court into the propriety of their sovereign acts and that any such adjudication in a United States court has a serious potential to embarrass the executive branch in the conduct

of foreign relations. *See Verlinden*, 461 U.S. at 493 ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States."). For this reason, the federal courts have long recognized that any rule of decision that "inhibit[s] the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). For example, until the enactment of the FSIA, federal courts always deferred to the State Department's determination whether a foreign state was entitled to immunity. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945). This practice was based on the belief that "our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of the judicial proceedings." *Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943).[21] Although the FSIA transferred the authority to make immunity determinations to the judiciary, the statute nonetheless was intended "to minimize irritations in foreign relations" arising out of litigation against foreign states, House Hearings at 29 (statement of Monroe Leigh), and "to promote the functioning of all governments by protecting a state from the burden of defending law suits abroad which are based on its public acts," *id.* at 27.

Adjudicating Respondents' claims against Petitioners in a United States court would starkly implicate these

[21] For similar reasons, this Court has previously invoked the "act of state" doctrine to deny review of claims virtually identical to those of Respondents. In *Underhill v. Hernandez*, 168 U.S. 250 (1897), a United States citizen sued a Venezuelan military officer who had allegedly assaulted, coerced, and detained the plaintiff. *Id.* at 251. The Court held that these were acts of state and "not properly the subject of adjudication in the courts of another government." *Id.* at 254 (citation omitted). More generally, under the "act of state" doctrine, an American court will not declare invalid the official act of a foreign sovereign performed within its own territory. *See W.S. Kirkpatrick v. Environmental Tectonics Corp.*, 492 U.S. 400, 405 (1990).

important foreign policy concerns underlying restrictive foreign sovereign immunity. For example, count IV of the complaint alleges that Article 14 of the United Nation's International Covenant on Civil and Political Rights "establishes internationally accepted legal standards of care for those who stand accused of crimes," and seeks a determination that Saudi Arabia violated those standards "[b]y intentionally, willfully, unlawfully, maliciously, recklessly, and with evil design and intent, restraining the Plaintiff against his will, by not providing an interpreter, or speaking to Plaintiff in a language he understood, by either not making the charges clear to him, or not making charges, and by compelling Plaintiff to sign statements which he could not understand." J.A. 7-8. Count V seeks a determination that Saudi Arabia's prison conditions and its treatment of Respondent in prison violated, *inter alia*, the prohibition on "torture . . . or . . . cruel, inhuman or degrading punishment" in Article 5 of the United Nation's International Bill of Human Rights. J.A. 8-9. Count III seeks a finding that Saudi Arabia violated Article 13 of the International Bill of Human Rights by preventing him from leaving Saudi Arabia. J.A. 6-7.

Each of these and the other claims asserted in the complaint would require the trial court to determine a host of politically sensitive issues, such as what motivated the Saudi police who arrested Respondent; whether there was legal cause for his arrest and detention; whether Respondent was physically abused during his interrogation; and whether conditions in Saudi prisons are acceptable. Such an inquiry most likely would require testimony from Saudi Criminal Investigative Division personnel, Saudi prison officials, and other officials of the Saudi government. The court would be asked to adjudge the lawfulness of numerous, particular aspects of the Saudi criminal justice system: Were the prison food and sleeping conditions adequate? Are Saudi Arabia's processes for deciding when and how to bring charges acceptable? Is its method of communicating with detainees who do not speak Arabic consistent with international law?

In short, far from being a dispute about an "ordinary commercial transaction" or the "everyday burdens of the marketplace," House Hearings at 24, 27 (statement of Monroe Leigh) (describing intended scope of jurisdiction under the "commercial activity" exception), this proceeding has the potential to require the most intrusive imaginable inquiry into a foreign state's internal policies and conduct. Saudi Arabia's governmental affairs would be grossly interfered with, and its status as a sovereign state affronted, if a United States court assumed the authority to declare that Saudi Arabia's system of arraignment, interrogation, and imprisonment is unlawful or that Saudi law enforcement officials acted wrongfully in their treatment of Respondent. The restrictive principle of foreign sovereign immunity is designed precisely to avoid judicial interference with such core "political or public acts about which sovereigns have traditionally been quite sensitive," *Victory Transp.*, 336 F.2d at 360, which could seriously impede the executive branch's conduct of relations with foreign states.

Moreover, such an expansive exercise of jurisdiction over a foreign state could have adverse consequences for the reciprocal treatment of the United States in foreign courts, as the United States emphasized in its statement filed in support of rehearing in the Eleventh Circuit:

> The United States has a very substantial interest in the application of the FSIA, which is the only means by which foreign states may be sued in United States courts. Foreign relations depend to a large extent on reciprocal treatment between two states. Thus, if police activities of foreign states are deemed commercial and questioned and punished in United States courts, it is likely that the law enforcement conduct of the United States will also be called into account in foreign courts. And, American law enforcement officials will have to appear in foreign courts to defend their conduct.
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> Further, if the prevailing law in this country is that foreign police activity can be judged in our courts by our standards, it will be difficult or impossible for the United States successfully to claim immunity elsewhere for its own such sovereign activities. Even when local foreign law would permit the United States to raise immunity defenses that would not be available under the FSIA, the United States nevertheless uses that statute as a standard for our own claims of immunity in foreign courts. Under this practice, the United States would be foreclosed from asserting immunity for claims in foreign courts involving our law enforcement activity.

J.A. 121-22 (citation omitted).

The assertion of jurisdiction by United States courts over internal Saudi law enforcement affairs also could complicate diplomatic relations in any future dispute in which the United States seeks the release of a United States citizen being detained in a foreign country. The highly sensitive nature of such matters is illustrated by the extensive diplomatic and political activity concerning Respondents' case. Respondent was interviewed by United States embassy officials while imprisoned; he was released following a request made by a United States Senator to the highest levels of the Saudi government; and diplomatic discussions have occurred since that time concerning Respondents' claims. The responsiveness of a foreign state to such political and diplomatic requests for intervention might well be affected if United States courts were free to adjudicate claims against that state challenging the lawfulness of either the particular or general conduct of its criminal justice system.

It is not for this Court or any United States court to weigh these foreign policy considerations in deciding the FSIA jurisdictional issue. Rather, it is precisely because such issues are uniquely outside the competence of the judiciary that courts should be reluctant to reach out to adopt an expansive interpretation of the "commercial activity" exception. It may be within the power of Congress, subject to the constitutional responsibilities of the President, to permit United States courts to hear dis-

putes based on public acts of a foreign state within that state's borders. Until Congress so decides, however, the courts should take special care to limit their exercise of jurisdiction to the types of cases specifically contemplated in light of the FSIA's central purposes. Decades of State Department determinations and judicial decisions on immunity, the legislative history of the "commercial activity" exception, and the plain language and purpose of the FSIA mandate that claims based on foreign state acts of an inherently governmental nature be immune from suit in the United States.

D. Respondents' "Duty To Warn" Negligence Claims Do Not Fall Within The "Commercial Activity" Exception

In addition to alleging many intentional torts, the complaint also alleges that Petitioners breached a duty to warn Respondent of the "hidden dangers of [his] employment," *i.e.*, that he might be wrongfully arrested, imprisoned, and tortured in Saudi Arabia in the course of his employment. J.A. 5, 14. Despite this pleading device, however, the essential acts complained of remain the non-commercial acts of Saudi law enforcement officials within Saudi borders. Because Respondents' "duty to warn" claims require proof of all of the alleged acts and injuries underlying the tort claims, these negligence claims are based upon inherently sovereign law enforcement activity abroad and cannot be adjudicated by a United States court. *See Millen Indus.*, 855 F.2d at 885 (holding that claims involving "mixed" commercial and governmental acts are immune if "the action is based on a sovereign activity").

More generally, if the mere addition of an allegation that a plaintiff should have been warned of the potential for wrongful foreign state conduct were sufficient to convert a claim from one based upon inherently sovereign conduct to one based upon commercial activity, the FSIA's doctrine of restrictive foreign sovereign immunity would be severly undermined. Almost any injury allegedly suffered as a result of a foreign state's governmental

acts could be recast in the form of a failure to warn of that potential injury, at least where the claimant has any sort of commercial relationship with the foreign state. Such an outcome would undercut Congress's manifest effort to ensure that foreign states be immune from any suit challenging their public acts, and would require an unacceptably intrusive inquiry into their internal affairs.

For essentially the same reasons, this Court has rejected similar attempts by plaintiffs to circumvent the government's immunity under the Federal Tort Claims Act (FTCA) by merely pleading a derivative cause of action such as the duty to warn. In *United States v. Shearer*, 473 U.S. 52 (1985), the survivor of Private Shearer, who had been killed by Private Heard off duty and away from base, brought suit under the FTCA, alleging that the Government negligently failed to supervise Heard and to warn other persons of his presence. *See id.* at 53-54. The Court held that the plaintiff's claims were barred under both the FTCA's intentional tort exception, 28 U.S.C. § 2680(h) (1988), and the doctrine of *Feres v. United States*, 340 U.S. 135 (1950). Looking to the language and legislative purpose of Section 2680(h), a plurality of the Court determined that the battery was the "immediate cause of . . . Shearer's death, and, consequently, the basis of [plaintiff's] claim." 473 U.S. at 55. The Court also found that the plaintiff's attempt to "fram[e] her complaint in terms of negligent failure to prevent the assault and battery" could not evade the reach of Section 2680(h) because it "cover[s] claims that sound in negligence, but stem from a battery committed by a Government employee." *Id.* A majority of the court agreed that the plaintiff's claims of negligent supervision and failure to warn were also barred under the *Feres* doctrine because inquiring into "basic choices about the discipline, supervision, and control of a serviceman" would contravene *Feres*' core concern that suits not interfere with military discipline. *Id.* at 58. The plaintiff could not circumvent *Feres* by characterizing her claim as a " 'straight-forward

personnel decision'" because it was the "*type* of claim that . . . would involve the judiciary in sensitive military affairs." *Id.* at 59 (emphasis in original).[22]

In this case, Respondents' efforts to recast their injuries as resulting from a failure to warn cannot alter the fact that the gravamen of their complaint is the alleged wrongful arrest, false imprisonment, and torture. A judicial exploration of such allegations would impermissibly embroil the court in adjudicating the lawfulness of governmental acts in foreign countries. Indeed, Respondents' negligent duty to warn claims would require an even more expansive inquiry into police practices of Saudi Arabia than the intentional tort claims. In order to award Respondents damages on these negligence claims, the trial court presumably would have to determine not only that Respondent was in fact arrested, imprisoned, and tortured without cause, but also that Saudi government officials had previously engaged in a pattern of similar activity such that Petitioners had knowledge of a danger which they had a duty to disclose. The prospect of a United States court summoning a foreign state to trial and not only awarding damages based on the alleged misconduct of police officials with respect to a particular plaintiff, but also issuing a judgment condemning that state's entire system of laws and justice, is manifestly incompatible with the FSIA's restrictive principle of sovereign immunity. For the same reasons that Respondents' intentional tort claims must be dismissed, their negligence claims must be dismissed as well.

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[22] Numerous lower courts have followed *Shearer*'s reasoning that a plaintiff may not plead around immune conduct by alleging a breach of duty to warn or similar negligence. *See, e.g., Persons v. United States*, 925 F.2d 292, 296-97 (9th Cir. 1991). *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194, 200 (2d Cir. 1987); *Satterfield v. United States*, 788 F.2d 395, 398 (6th Cir. 1986).

II. RESPONDENTS' CLAIMS HAVE INSUFFICIENT CONTACT WITH THE UNITED STATES TO SUPPORT JURISDICTION UNDER SECTION 1605(a)(2)

Part I demonstrates that the FSIA's "commercial activity" exception does not permit a United States court to adjudicate claims involving a foreign state's inherently sovereign acts, irrespective of their alleged relationship to other commercial activity. For that reason alone, the Eleventh Circuit's decision must be reversed, and no further issues need be reached. This Part II further shows that even if Respondents' claims could be said to be "based upon" commercial activity insofar as the complaint alleges that Respondent's mistreatment was related to his job performance, the court of appeals' holding must still be reversed because that commercial activity occurred only in Saudi Arabia and did not have "substantial contact with the United States" as required under Section 1603(e) of the Act. In addition, jurisdiction cannot be exercised over Royspec in any event because the record is devoid of any connection between its commercial activities and Respondents' claims.

A. Respondents' Claims Do Not Have The Required Factual Or Legal Nexus With Petitioners' Activity In The United States

To find the required "substantial contact" between the United States and the alleged wrongful arrest, imprisonment, and other injurious acts in Saudi Arabia, the court of appeals first determined that these acts were "intertwined with [Respondent's] employment at the Hospital." J.A. 113. It then found a sufficient "jurisdictional nexus" with commercial activity carried on in the United States because Respondent's employment in Saudi Arabia was connected to his alleged recruitment and hiring in the United States. J.A. 113. The court reasoned that if Respondent had not been recruited in the United States, he would not have worked in Saudi Arabia, and therefore he would not have been arrested, imprisoned, or allegedly tortured. J.A. 113. By adopting such a "but for" causa-

tion analysis and ignoring the fact that *none* of the alleged acts in the United States has any legal or factual relevance to Respondents' claims, the court of appeals adopted an interpretation of the "commercial activity" exception which is contrary to both the statutory language and the underlying congressional intent, has been uniformerly rejected by the lower courts and is virtually limitless.

Clause One of the "commercial activity" exception limits its jurisdiction to claims based upon foreign state commercial activity which is "carried on in the United States," 28 U.S.C. § 1605(a)(2), *i.e.*, which has "substantial contact with the United States," § 1603(e). This "substantial contact" requirement means that it is not enough that an action against a foreign state is based upon commercial activity or that the foreign state has had some minimal commercial contacts with the United States. Rather, the commercial activity complained of must itself have an important connection to the United States. The FSIA's legislative history specifies that the "substantial contact" requirement "is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff." House Report at 17. Furthermore, the "substantial contact" requirement demands more than the due process minimum contacts requirement. *See* House Report at 13; *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988); *Maritime Int'l Nominees Establishment (MINE) v. Republic of Guinea*, 693 F.2d 1094, 1109 n.23 (D.C. Cir.), *cert. denied*, 464 U.S. 815 (1983). The legislative history's examples also confirm that a commercial transaction occurring "in part" in the United States is not "carried on in the United States" unless an essential element of the transaction was performed in the United States.[23]

[23] The examples include "import-export transactions involving sales to, or purchases from, concerns in the United States" and "indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States." House Report at 17.

In applying this "substantial contact" standard, the lower courts have articulated various tests concerning the necessary connection or "nexus" between the United States and the foreign state commercial activity on which the action is based. Some courts have ruled that the "substantial contact" requirement is satisfied only if the plaintiff can demonstrate "a direct causal connection" between the commercial activity in the United States and the acts forming the basis of the complaint, or if the commercial activity in the United States " 'is an element of the cause of action under whatever law governs [the] claims.' " *Zedan*, 849 F.2d at 1514 (quoting *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982)). Most courts have simply stated that Clause One of Section 1605(a)(2) requires a "jurisdictional nexus" between the foreign state's commercial activity in the United States and the commercial activity abroad at issue in the case, which means both that "the commercial activity that provides the jurisdictional nexus [must] also be the activity on which the lawsuit is based," *Stena Rederi v. Comision de Contratos*, 923 F.2d 380, 387 (5th Cir. 1991), and that there must be a substantial connection between the commercial acts in dispute and the United States. *See, e.g., Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991) (requiring a "material" connection), *petition for cert. filed*, 60 U.S.L.W. 3481 (U.S. Dec. 4, 1991) (No. 91-956).

Although Petitioners believe that the *Zedan* formulation of the test is the most consistent with the statutory language and the underlying congressional intent, the critical point is that it is clear under any formulation that the "carried on in the United States" requirement refers to significant activity, of legal and factual relevance to the cause of action, that has occurred in the United States. Contrary to the Eleventh Circuit's decision, a mere "but for" relationship between commercial

activity in the United States and the commercial activity abroad forming the basis of the claim is not sufficient to create jurisdiction under Clause One. *See, e.g., Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 894 (7th Cir. 1991) (where plaintiff sued Air France for personal injuries resulting from the negligence of an Air France employee at a French airport, claiming that his cause of action was based upon Air France's commercial activity in the United States because he would not have been working at the airport "but for" a lease between his United States employer and Air France requiring the employer to provide maintenance workers at the airport, court of appeals held that the plaintiff could not satisfy the "substantial contact" requirement because "[n]one of the elements of [his] claim concern acts in the United States"); *Zedan*, 849 F.2d at 1514 (rejecting plaintiff's theory under which "jurisdiction would extend to any and all disputes between Zedan and Saudi Arabia subsequent to the [recruitment] phone call, merely because but for that call Zedan would not have traveled to Saudi Arabia").

Thus, regardless of the particular formulation of the "substantial contact" nexus requirement, the court of appeals' holding must be reversed. With respect to the intentional tort claims, Respondent's own allegations are that he was injured *wholly in Saudi Arabia*, as a result of arrest, imprisonment and torture *wholly in Saudi Arabia*, for reporting an unsafe condition at a hospital at which he was employed *wholly in Saudi Arabia*. Even a cursory review of the allegations of the complaint shows that these intentional tort claims require no proof of *any* activity in the United States. For example, the Unlawful Detainment count alleges that Saudi Arabia violated international law by "prohibiting [Respondent] from exiting the country, as was his legal right." J.A. 7. No act in the United States has any legal or factual significance to this cause of action. Similarly, Respondent's Wrongful Arrest and Imprisonment count—which alleges that Saudi Arabia violated his rights under international law to be informed of the charges against him, to have time to prepare a defense, to consult with counsel, to have access to an interpreter, and not to be compelled to testify against himself, J.A. 7-8—has no factual or legal relevance to any activity that is said to have occurred in the United States. The same is true of the other intentional tort claims in the complaint.

In short, even if Respondent's tort claims could be said to be based upon commercial activity, that activity was his job performance in Saudi Arabia. Events occurring before he started work in Saudi Arabia in December 1983 are literally irrelevant to these claims. The mere fact that Petitioners performed some commercial acts in the United States does not suffice to create jurisdiction. The alleged recruitment of Respondent in the United States through placement of a magazine advertisement is irrelevant to his intentional tort claims because Respondent does not contend that HCA recruited him for the purpose of enticing him to Saudi Arabia for imprisonment and torture. Nor does Respondent's act of signing the employment contract in the United States have anything to do with the intentional tort claims. Indeed, Respondent concedes that his claims are *not* based upon "disputes relating to the contract." R. 29, 7. Because none of the alleged acts in the United States is legally or factually relevant, the intentional tort claims do not have "substantial contact" with the United States.[24]

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[24] The lower courts have reached the same result in analogous cases. *See, e.g., America West*, 877 F.2d at 797 (Clause One did not confer jurisdiction over negligence claim for faulty maintenance of aircraft engine in Ireland by subsidiary of state-owned airline where that entity performed no aircraft maintenance in the United States); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1360 (9th Cir. 1988) (Clause One's jurisdictional nexus requirement not satisfied where only connection between wrongful death action involving crash in Mexico or state-owned airplane and the United States was servicing of the plane in the United States the day before the accident); *Vencedora Oceania Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 203-04 (5th Cir. 1984) (holding that Clause One does not confer jurisdiction over conversion claim based on state-owned corporation's decision to tow plaintiff's vessel to Algerian

Similarly, Respondents' duty to warn claims also are not based upon commercial activity "having substantial contact with the United States." Although Respondents have suggested that these claims have a nexus with the United States because Petitioners could have warned him in the United States prior to his commencement of employment,[25] this argument ignores the fact that the overwhelmingly logical place for any such warning to have occurred was Saudi Arabia. Even if Petitioners had a duty to warn Respondent of the alleged "hidden dangers" of employment in Saudi Arabia, they certainly had no duty to disclose those dangers to him in the United States before he commenced employment.[26] Disclosure of these alleged dangers to Respondent at any time after he commenced work in Saudi Arabia and before he reported the alleged safety violation at KFSH would have precluded the negligence claims. The relevant "omission," therefore, would be the failure to disclose this "danger" during the nine-month period preceding Respondent's arrest while he was

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port, where corporation's business in the United States was unrelated to the towing operation).

[25] An additional reason to dismiss Respondents' duty to warn claims is that the only alleged acts taken in the United States were the acts of HCA, not Petitioners. The contacts of an agent of a foreign state with the United States should not be attributable to the foreign state for jurisdictional purposes under the FSIA. *See e.g., Compania Mexicana de Aviacion*, 859 F.2d at 1360 (holding that the servicing of an airplane by a United States company in the United States for a state-owned airline was an insufficient contact to support jurisdiction under Clause Two of § 1605(a)(2) over tort claims arising from crash of that airline in Mexico); *Barnett v. Iberia Airlines*, 660 F. Supp. 1148, 1152 (N.D. Ill. 1987) (holding that under Clause One, the sale of an airline ticket to plaintiff by a United States company, acting as agent for a state-owned airline, does not establish the requisite "nexus" between the United States and the commercial activity of the state-owned airline abroad forming basis of tort claim).

[26] Under the terms of Respondent's employment contract, J.A. 40, and as Respondents admit, J.A. 4, Respondent's employment with the Hospital did not begin until he returned to Saudi Arabia in December 1983.

living and working in Saudi Arabia. The mere fact that Respondent theoretically could have been "warned" in the United States prior to commencing employment does not alter the fact that the essential locus of the omission was in Saudi Arabia.[27] *Cf. Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984) (Scalia, J.) (holding that foreign state's conduct in the United States related to plaintiff's tort claim was not "in and of itself tortious" and that because the gravamen of the tort claim was a failure to compensate for the taking of property, the "omission . . . must be deemed to occur in" the foreign state), *cert. denied*, 470 U.S. 1051 (1985). Moreover, even the critical events relating to the formation of the employment contract—the interview and the offer—occurred in Saudi Arabia as well. Because Saudi Arabia is where a warning, if any, logically should have occurred, Respondent's negligence claims lack the required "substantial contact" with the isolated activities in the United States.

B. Even If Arguably Relevant To Respondents' Claims, The Activities Of Saudi Arabia And KFSH Did Not Have "Substantial Contact" With The United States

Irrespective of their legal or factual relevance to Respondents' claims, Saudi Arabia's and KFSH's activity in the United States was not substantial enough to create jurisdiction under the "commercial activity" exception. In construing the "substantial contact" requirement, the lower courts have consistently held that where the essential elements of the commercial activity in dispute occurred

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[27] Courts are often called upon to determine the locus of an omission for purposes of the FTCA, which requires application of "the law of the place where the act or omission occurred." 28 U.S.C. 1346(b) (1988). *See Richards v. United States*, 369 U.S. 1, 10 (1962). Because an omission by definition is an act which failed to occur, a negligent omission cannot actually "occur" anywhere. *See Ducey v. United States*, 713 F.2d 504, 508 n.2 (9th Cir. 1983). Nevertheless, in determining which forum's substantive law to apply under the FTCA, courts have held that the "locus" of an omission should be considered to be the "place where the act necessary to avoid the negligence should have occurred." *Id.*

ouside the United States, incidental contacts that are part of a series of events related to the disputed commercial conduct are not "substantial." For example, in *MINE*, 693 F.2d at 1109, the court held that the contacts by the Republic of Guinea—two business meetings related to a breach-of-contract claim—were nothing more than "transitory" and "insubstantial" for purposes of the Act, especially given "their uncertain scope and importance." *See also Gerding*, 943 F.2d at 527 (in case involving wrongful death action, meetings in United States did not constitute "substantial contact" for purposes of "commercial activity" exception); *Zedan*, 849 F.2d at 1513 (in breach-of-contract action in which both the performance of the employment contract and its alleged breach occurred in Saudi Arabia, recruitment call to the United States—which seemed "analogous to the placement of an advertisement in a local California newspaper inviting job applicants to go to Saudi Arabia"—did not satisfy the "substantial contact" requirement).

Similarly, in this case HCA's advertisement of the position at the Hospital and the "fortuitous happenstance" that Respondent signed his contract while in the United States, J.A. 95, do not constitute "substantial contact" with the United States. Indeed, these limited contacts would not provide even the "minimum contacts" necessary under the due process clause for personal jurisdiction.[28] To the extent that the formation of Respondent's contract is in any sense relevant to the case, which Petitioners deny, the critical events—the job interviews and offer—occurred in Saudi Arabia. Permitting jurisdiction in these circumstances would be tantamount to holding, contrary to the specific intent reflected in the legislative history, that jurisdiction may be "occasioned simply by the U.S. citizenship . . . of" Respondent. House Report at 17. The total amount of activity of Saudi Arabia and KFSH in

[28] *See Johnston v. Frank E. Basil, Inc.*, 802 F.2d 418 (11th Cir. 1986) (recruitment by out-of-state defendant in the forum state insufficient to satisfy minimum contacts requirements for personal jurisdiction).

the United States with respect to Respondent was not "substantial" under 28 U.S.C. § 1603(e), and therefore jurisdiction must be denied.

C. Royspec Cannot Be Subjected To Jurisdiction Under The "Commercial Activity" Exception Because It Is A Veritable Stranger To Respondents' Claims

The arguments set forth in Part I.B. demonstrate that jurisdiction cannot be exercised over any of the three Petitioners in this case. An additional ground for dismissing the suit against Royspec is that Royspec simply had no involvement whatsoever in any of the events involving Respondents. The court of appeals found a "jurisdictional nexus" between Royspec's commercial activity in the United States and Respondents' claims based solely on Respondent's receipt of the telephone number of Royspec's Maryland office for contacting his family in the event of an emergency, and Respondent's unsupported allegation that the telex designation "ROSPEC," appearing on four telegrams in which Respondent's employment is discussed, "may be" the designation for Royspec. J.A. 114. This holding is erroneous because, as the district court found, uncontradicted record evidence demonstrates that Royspec had absolutely no involvement in Respondent's alleged recruitment or hiring in the United States.

Because Royspec is a separate entity, it is entitled to a "presumption of independent status" and cannot be sued for the acts of other governmental entities absent a factual basis for overcoming this presumption. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983). Respondents produced no evidence to overcome the presumption that the acts of HCA, Saudi Arabia, or KFSH cannot be attributed to Royspec. Therefore, jurisdiction can be asserted over Royspec only if its *own* acts in the United States provide the necessary "substantial contact" with the acts on which Respondents' claims are based.

Although Royspec, as the Hospital's purchasing agent, engaged in commercial activity in the United States, un-

controverted affidavits in the record confirm that Royspec did not participate in any manner whatsoever in the recruitment of Respondent. J.A. 23-24, 30, 31. That role was performed, exclusively by HCA, as *required* by the terms of the contract between HCA and the Hospital. J.A. 72-74. The mere fact that Royspec was identified as a United States contact for families of KFSH employees in case of emergencies cannot suffice, under any conceivable test, to constitute a "substantial contact" with the activities on which Respondents' claims are based.[29]

Respondent also argued below that a reference to "201050 ROSPEC SJ" on Hospital documents, and in correspondence between the Hospital and HCA concerning his employment, referred to "ROSPEC" and therefore showed that Royspec was involved in his recruitment. In response, Royspec submitted an uncontroverted affidavit confirming that the word "ROSPEC" on certain documents was a telex designation in Saudi Arabia and not a reference to Royspec.[33] Without explanation, the court of appeals chose to ignore this undisputed evidence in favor of Respondents' mere suspicion:

> We also note that four telegrams, all of which acknowledge [Respondent's] employment, contained the telex designation "ROSPEC," which, according to Nelson, may be the designation for Royspec. Although Saudi Arabia denies that the desgnation "ROSPEC" represents Royspec, on the record before the court and under the FSIA, we conclude that Royspec is within the subject matter jurisdiction of the court. J.A. 114.

However, Respondents' speculation about Royspec's involvement is entitled to no weight, and Royspec's uncon-

[29] As Royspec demonstated in the district court, "201050 ROYSPEC SJ" is the telex number for the Hospital in Saudi Arabia. It follows the word "telex" on the bottom of Hospital letterhead and is not even spelled the same as "Royspec." J.A. 29-30, 32. These references instead establish that the Hospital and HCA were communicating with each other directly through telexes to Saudi Arabia and *did not* use Royspec as an intermediary.

troverted affidavits were required to be taken as true. *See Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1239 (6th Cir.) (giving conclusive weight to "uncontroverted affidavits" of defendant on 12(b)(2) motion), *cert. denied*, 454 U.S. 893 (1981). The district court's resolution of this factual dispute in Royspec's favor cannot be set aside because the record does not show that it was clearly erroneous. The court of appeals' holding with respect to Royspec should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and Respondents' actions should be dismissed.

Respectfully submitted,

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APPENDIX

1. Section 1603(d) of the Foreign Sovereign Immunities Act provides:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

2. Section 1603(e) of the Foreign Sovereign Immunities Act provides:

> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

3. Section 1605(a)(2) of the Foreign Sovereign Immunities Act provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
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> * * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

4. Section 1605(a)(5) of the Foreign Sovereign Immunities Act provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> * * * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse or process, libel, slander, misrepresentation, deceit, or interference with contract rights

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